No. 75-1900

In the

# Supreme Court of the United States

OCTOBER TERM, 1975

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

*Petitioner,*

*vs.*

STATE OF ILLINOIS ex rel RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

## BRIEF AMICUS CURIAE IN OPPOSITION

BARRY T. MCNAMARA
PETER B. CAREY
TOM SCHEUNEMAN

Of Counsel:
O'BRIEN, CAREY, MCNAMARA & SCHEUNEMAN, LTD.
39 South LaSalle Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

# INDEX



## Table Of Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

---

## *No. 75-1900*

---

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

*Petitioner,*

*vs.*

STATE OF ILLINOIS ex rel RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

*Respondent.*

---

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

---

Independent Community Banks in Illinois (hereinafter "ICBI"), respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused. In support of its motion, ICBI respectfully suggests to this Honorable Court the following:

1. ICBI, an Illinois not-for-profit corporation, is an organization of 265 small and medium sized community

banks located throughout the State of Illinois, including the City of Chicago. As such, ICBI represents a constituency most likely to be directly affected by the economic and business impact of any decision in this cause.

2. ICBI's interest in this case arises from several factors. Recently, ICBI was plaintiff in an action in the United States District Court for the Northern District of Illinois against one of the defendants-appellants (i.e., First National Bank of Chicago) in the instant cause. In its action, ICBI sought an injunction prohibiting the First National Bank of Chicago from operating "community offices" in connection with electronic banking facilities known as Customer Bank Communication Terminals ("CBCT's") in ten Chicago and suburban locations. This action was settled by agreement whereby the First National Bank of Chicago agreed to close its community offices and to leave the CBCT's in place pending and subject to the decision of the Court of Appeals for the Seventh Circuit which the petitioner, Continental Illinois National Bank & Trust Company of Illinois, now seeks to bring before this Court by way of a writ of certiorari. Accordingly, ICBI has a direct and vital interest in any action taken by this Court.

3. In the instant case, the petitioner has raised questions far broader than the issue of branch banking as it applies to electronic banking facilities. These questions include what is described as "national payments mechanism" and Electronic Funds Transfer Systems (EFTS). Because of the character of ICBI's membership, it is believed that the brief which *amicus curiae* proposes to file will contain a more complete response to the "EFTS" contentions of petitioner than the response of the State Commissioner of Banks and Trust Companies which, it is

anticipated, will focus on the anti-branching provisions of the Illinois banking laws.

Respectfully submitted,

BARRY T. MCNAMARA
PETER B. CAREY
TOM SCHEUNEMAN

Counsel for Independent Community
Banks in Illinois
39 South LaSalle Street
Chicago, Illinois 60603
(312) 372-1462

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

## No. 75-1900

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

*Petitioner,*

*vs.*

STATE OF ILLINOIS ex rel RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## BRIEF FOR AMICUS CURIAE IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A of the Petition. The opinion of the United States District Court for the Northern District Court of Illinois is attached as Appendix B of the Petition.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether off-premises electronic bank facilities known as Customer Banking Communication Terminals (CBCT's) are branch banks within the meaning of the National Bank Act, 12 USC § 36(f).

## STATUTES INVOLVED

The pertinent Federal and Illinois statutes are accurately described in the Petition and are set forth in full in Appendix C thereof.

## STATEMENT

This case involves off-premises electronic bank facilities known as Customer Bank Communication Terminals (CBCT's) which the Court of Appeals held to be branch banks within the meaning of that portion of the National Bank Act known as the McFadden Act, 12 USC §36(f). Off-premises CBCT's, whether manned or unmanned, are electronic devices which permit a bank's customer to effect a number of transactions typically accomplished at the bank's home office. By insertion of a plastic card into the device, the customer may (i) withdraw cash from his checking or savings account; (ii) obtain loans on a credit card account; (iii) deposit checks or cash to his checking or savings account; (iv) transfer funds between checking and savings accounts; (v) make payments on installment loans, credit card charges and certain utility bills.

On June 20, 1975, the Illinois Commissioner of Banks and Trust Companies ("Commissioner") sued to enjoin the petitioner, Continental Illinois National Bank & Trust Company of Chicago ("Continental") from operating and maintaining off-premises CBCT's, contending that they are branches under 12 USC §36 (f), and thus prohibited to

national banks in Illinois under 12 USC §36 (c) and §6 of the Illinois Banking Act (Ill. Rev. Stat. 1975, Ch. 16½, §106). A similar action was subsequently commenced by the Commissioner against the First National Bank of Chicago ("First National"). The two cases were consolidated for opinion in both the District Court and the Court of Appeals.*

In its opinion, the District Court held that off-premises CBCT's, manned or otherwise, are not branch banks insofar as the cash withdrawal and bill payment functions are concerned, but are illegal branches insofar as the deposit, loan or transfer functions are concerned. On appeal and cross appeal, the United States Court of Appeals for the Seventh Circuit held that all of the functions of the off-premises CBCT's constitute branches under section 36(f) of the McFadden Act, and are therefore illegal to national banks in Illinois under section 36(c) of that Act.

---

* First National, on July 9, 1976, petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in these consolidated cases. That Petition is before this Court as No. 76-17. To avoid duplication effort and expense, we respectfully ask the Court to consider this amicus brief in conjunction with the petition of First National. There, too, consent for the amicus brief was obtained from respondent but refused by petitioner.

## ARGUMENT

### THE WRIT SHOULD BE DENIED BECAUSE THIS CAUSE RAISES NO ISSUE OF FEDERAL LAW WHICH HAS NOT PREVIOUSLY BEEN SETTLED BY THIS COURT.

#### INTRODUCTION

If there is one subject on which the decisions of this Court have provided particularly clear and consistent guidance, it is branch banking. Mr. Justice Clark's opinion for a unanimous Court in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), which traced the legislative history of the McFadden Act as it relates to branch banking, was specifically followed three years later in *First National Bank in Plant City* v. *Dickenson*, 396 U.S. 122, 131 (1969). Four years later, Mr. Justice Clark (sitting by designation in the Eighth Circuit) again addressed the subject in *Driscoll* v. *Northwestern National Bank*, 484 F.2d 173 (1973), a decision cited and quoted by the Court of Appeals for the District of Columbia in *I.B.A.A.* v. *Smith*, 534 F.2d 921 (D.C. Cir. 1976). The latter decision, a masterful analysis by Judge Wilke of section 36 of the McFadden Act as it relates to CBCT's, was relied upon heavily by the Seventh Circuit opinion in the instant case.

Because the question of what constitutes branch banking is one of federal, rather than state, law and because that question has been so clearly addressed by this Court in *Walker Bank* and *Plant City*, the decisions of the lower federal courts have been remarkably consistent. No doubt, too, the guiding hand of Mr. Justice Clark has contributed

to this continuity. The end result is that the Petition now before this Court, notwithstanding petitioner's efforts to the contrary, presents no novel question of law upon which this Court has not heretofore spoken with clarity, and fails to demonstrate any need to resolve conflicting or inconsistent decisions among the circuits.

To the extent that the Petition does present issues of substance, those are entirely questions of legislative policy wholly within the province of the Congress.

## A. NEITHER THE NATIONAL PAYMENTS MECHANISM NOR ELECTRONIC FUND TRANSFER SYSTEMS (EFTS) IS AN ISSUE IN THE INSTANT CAUSE.

In an apparent effort to broaden the issues, petitioner would have this Court believe that the future of what is characterized as the national payments mechanism and its technological implement (EFTS) hinges on the outcome of this case. Petitioner suggests that unless off-premises electronic banking facilities are permitted by judicial decree, even in states such as Illinois which prohibit such forms of branch banking, (a) the participation of national banks in the "new electronic payments mechanism" might be foreclosed or restricted, (b) banks will be prevented from competing effectively against their nonbank competitors, and finally, (c) significant technical advances such as EFTS might be "chilled" before their effectiveness can be evaluated. In truth, these considerations are not even remotely at stake in the instant cause. But even if they were, they would have no bearing on the single issue presented by this case: Whether CBCTS's are branch banks within the meaning of section 36(f).

Petitioner would arrogate unto itself the prerogatives which Congress deemed worthy of a national study commission. In 1970, the Congress established the National Commission on Electronic Fund Transfers, whose membership includes the Comptroller of the Currency, representatives of other Federal agencies, representatives of the financial and business community, individuals representing the public and officials from state agencies which regulate banks and similar financial institutions. 12 USC § 2401 *et seq.* The Commission, appointed in 1975, has the responsibility to:

> "Conduct a thorough study and investigation and recommend appropriate administrative action and *legislation necessary* in connection with the possible development of public or private electronic fund transfer systems, . . . ." (Emphasis added.)

Petitioner would pre-empt the work of the Commission by placing national banks in control of the relationship of EFTS to the national payments mechanism. As the Court of Appeals for the District of Columbia observed in *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921 (D.C. Cir. 1976) at 951, "such a *fait accompli* is hardly in the public interest." Clearly then, the role that national banks are to play in electronic funds transfer systems and the relationship of EFTS to the "national payments mechanism" are questions for the National Commission and the subject of possible amendatory legislation, not an issue for judicial resolution.

Petitioner maintains that unless it is permitted to operate electronic banking facilities outside its main bank office, it will be competitively disadvantaged insofar as other financial, and nonfinancial institutions are concerned.

The "competitors" include savings and loan associations, credit unions, and national credit card companies. Whatever the merit of this thesis, it too is beside the point. The McFadden Act, the construction of which presents the only possible issue for review, does not in its language or in its history express concern for the competitive position of national or state banks *vis-à-vis* other financial and non-financial institutions. Its purpose, as articulated by this Court in *Plant City* and *Walker Bank* is to assure competitive equality between national *banks* and state *banks* with respect to branch banking activities. 396 U.S., at 131-132; 385 U.S., at 261. Whatever the concern may be regarding the competitive position of national banks *vis-à-vis* other institutions, it is beyond the purview of the McFadden Act and may not be employed to sanction otherwise unlawful branching activities by national banks.

## B. THE McFADDEN ACT IS INTENDED TO PROMOTE COMPETITIVE EQUALITY BETWEEN NATIONAL BANKS AND STATE BANKS ONLY INSOFAR AS BRANCH BANKING IS CONCERNED.

As the next variation on its theme of issue expansion, petitioner maintains that "a holding that electronic terminals are branches for national banks significantly affects all national banks and the national banking system irrespective of the branch requirements, and the branch status of electronic terminals for state-chartered banks under the law of the state where the terminals are located." (Petition, p. 8.) This is so, we are told, because federal banking laws impose minimum capital and branch application requirements upon all facilities of national banks deemed to be branches under federal law. 12 USC sections 36(d) and 51. Therefore, the argument continues, in a state where CBCT's are not branches for state banks, or where no branch restrictions are imposed upon CBCT's of state

banks, the Federal minimum capital and branch application requirements would apply to CBCT's operated by national banks if they are deemed to be branches under Section 36(f) of the McFadden Act. The complaint, if we understand it correctly, is that this runs contrary to the policy of competitive equality embodied in the McFadden Act.

The difficulty with petitioner's tortuously-reasoned complaint in this regard is that it is beyond the scope of judicial remedy. It is simply inherent in the McFadden Act's adherence to the dual banking system.

This Court, in both *Walker Bank* and *Plant City*, observed that the basic policy of the McFadden Act is to insure that the national and state banking systems be permitted to coexist and, insofar as branch banking is concerned, to compete with each other on equal terms. Despite this basic policy objective, perfect symmetry or equality between national and state banks is not obtainable because of the dual nature of the systems. There are inherent differences. The capital requirements for national and state banks happen to be one of those areas in which states may permit some competitive advantage for their banks, since the capital requirements of the McFadden Act apply only to national banks.

With respect to CBCT's, for example, whether branches or not under state law, the state minimum capital requirements either could not apply at all (i.e., where CBCT's are not branches under state law), or could be less than the federal minimum capital requirements (i.e., where CBCT's are branches under state law). However, since "perfect equality" between national and state banks cannot be accomplished in a dual banking system, no transgression of the McFadden Act policies is involved. As

the court in *Independent Banker's Association of America* v. *Smith, supra,* concluded:

> "[T]his is not some new source of inequality threatening to disrupt the competitive balance between our state and federal banking systems. Since the McFadden Act's passage in 1927, it has always been possible for the states to create some competitive advantages for state bank branches (CBCT's or otherwise) in the area of capitalization requirements. And, as the comptroller notes, 'in other non-branching areas, national banks enjoy competitive advantages.' Notwithstanding these imperfections, the dual banking system has endured, and we see no reason to disturb that part of the system where state law still reigns supreme." *IBAA* v. *Smith, supra,* at 950.

In a related argument asserting "competitive inequality," petitioner suggests that if CBCT's are "branches" under Federal law, then in a state which prohibits branch banking but permits CBCT's as not being "branches," CBCT's could not be operated by national banks even though state banks were permitted to do so.

Petitioner's argument is simply wrong. Under section 36(c) of the McFadden Act and consistent with its policy objectives, the national banks are free to pursue activities authorized by state law to state banks, whether those activities constitute "branching" under state law or not. *IBAA* v. *Smith, supra,* at 948-950. Section 36(c) authorizes a national banking association to operate new branches within a state if the law of that state expressly permits such activity, regardless whether the state law considers the activity branching or not. 12 USC Section 36(c); *IBAA* v. *Smith, supra,* at 948-950.

## C. THE STATE OF ILLINOIS PROHIBITS BRANCH BANKING TO ITS STATE-CHARTERED BANKS.

Alleging competitive disadvantages at the hands of state chartered banks in Illinois, petitioner urges that the federal definition of "branch" contained in the McFadden Act be construed in accordance with what petitioner deems to be the competitive realities in Illinois irrespective of the Act's clear and unmistakable language to the contrary.[1] Thus, petitioner urges that it be permitted to operate off-premises electronic banking facilities despite Illinois' statutory prohibition that:

> "No bank shall establish or maintain more than one banking house or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this, or any other state of the United States, any branch bank, nor shall it establish or maintain in this State any branch bank or additional office or agency for the purpose of conducting any of its business." Ill. Rev. Stat. Ch. 116½, Section 106.

In this request, petitioner contends that the Commissioner, at least by implication, has permitted state banks to engage in similar activities. Petitioner argues that the doctrine of competitive equality requires that it be permitted to operate its off-premises electronic banking facilities because the Illinois Commissioner, as a matter of administrative practice, has authorized state banks to engage in similar activities. Such an argument ignores the

---

[1] Section 36(f) contains a broad definition of "branch" which clearly encompasses CBCT's:

> "The term 'branch' as used in this section shall be held to include any branch bank, branch office or branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

clear language of Section 36(c) of the McFadden Act and, as a consequence, misapprehends the relationship between Federal and state law on the question of branch banking. Section 36(c) authorizes national banks to engage in branch banking *only* if similar activities are permitted to state banks "*by the statute law of the state in question by language specifically granting such authority affimatively and not by implication or recognition.*" 12 USC § 36(c). In reaching this determination, state law controls and administrative practice or interpretation are irrelevant. *First National Bank of Fairbanks* v. *Camp,* 465 F.2d 586, 595 (D.C. Cir. 1972).

Moreover, petitioner's representation that the Illinois Commissioner has authorized such off-premises banking activities similar to those proposed by petitioner is an error. (See District Court Opinion, petitioner's Appendix, pp. 35-36.) Particularly, with respect to what is described as the Moneymatic 365 System, the record clearly shows that the Illinois Commissioner has in no way approved that operation, nor has his approval been sought at any time. Indeed, as his deposition discloses, he first learned of its existence during this litigation. This hardly constitutes administrative approval, tacit or otherwise, of such a system.

Apparently conceding that Illinois does not permit branch banking, either in law or in fact, petitioner next contends that state banks in Illinois may engage in any activity permitted national banks, and that accordingly competitive equality will be maintained even if petitioner is allowed to operate its off-premises CBCT's. This argument is bold, novel, at odds with the language of Section 5(11) of the Illinois Banking Act and completely contrary to the entire thrust of the McFadden Act.

First, section 5(11) of the Illinois Banking Act does not say, as petitioner maintains, that "Illinois State Banks shall have all powers of national banks" notwithstanding any other provision of the Illinois Banking Act. In pertinent part, Section 5(11) provides:

> "A bank organized under this Act . . . shall . . . have all the powers conferred by this Act and the following additional general corporate powers:
>
> • • •
>
> (11) Notwithstanding any other provisions of this Act, to do any Act and to own, possess, and carry as assets property of such character, including stock, which is at the time authorized or permitted to National Banks *by an Act of Congress* and subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law." (Emphasis supplied.)

Thus, section 5(11) does not allow state banks in Illinois to perform any act *performed* by a national bank, but authorizes state banks to perform only those acts *specifically authorized* to national banks by an Act of Congress. Of course, the McFadden Act authorizes national banks to engage in branch banking only when, where, and to the extent state banks are permitted to do so under state law. Clearly then, petitioner's reading of Section 5(11) is in error.

More importantly, the construction of Section 5(11) urged by petitioner would undermine the entire thrust and purpose of the McFadden Act. The language and history of that Act,[2] as well as this court's opinions in *Walker Bank* and *Plant City,* express a policy that the state law is to be preeminent on the question of branch

---

[2] See, *Walker Bank,* 385 U.S. at 256, 260; *IBAA* v. *Smith, supra,* at 930-932.

banking. This is assured through the device of incorporating state statutory provisions via section 36(c) of the McFadden Act. Petitioner's contention would override this statutory mandate by permitting national banks to assume the lead on when, where, and to what extent branch banking is to be permitted on the state level.

Finally, petitioner's construction of Section 5(11), standing alone and without regard to the McFadden Act, is expressly contrary to the prohibition against branch banking contained in section 6 of the Illinois Banking Act. The likelihood that the Illinois Courts would adopt such an interpretation of section 5(11), is, we submit, nonexistent. Elementary rules of statutory construction suggest that inconsistent interpretations are not favored, and that, wherever possible, a statute is to be construed consistent with its purpose and so as to give meaning to all of its sections.

## D. OFF-PREMISES CUSTOMER BANK COMMUNICATION TERMINALS (CBCT'S) ARE BRANCHES WITHIN THE MEANING OF SECTION 36(f) OF THE McFADDEN ACT.

The threshold determination in any branch banking controversy is whether the off-premises facilities owned and operated by a national bank are "branches" within the meaning of the McFadden Act. While the Act incorporates state law in determining when, where and to what extent branches may be permitted, the ultimate question of what constitutes the branch is a federal one. *First National Bank in Plant City* v. *Dickenson,* 396 U.S. 122 (1969); *First National Bank* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966).

The term "branch" is defined in section 36(f) of the McFadden Act and includes any branch bank or additional

office "at which deposits are received or checks paid, or money lent." According to Representative McFadden's own understanding of the intent of the section, the term branch also includes any place outside or away from the main bank office where the bank is "transacting any business carried on at the main office." 68 Cong. Rec. 5816 (1927).

As we have seen, the CBCT's here in issue are off-premises electronic facilities which permit a bank customer to withdraw cash from his checking or savings account, obtain loans or "cash advances" on credit card accounts, deposit checks or cash to his checking or savings accounts, transfer funds between checking and savings accounts and pay installment loans, credit card charges, and certain utility bills.

To avoid the obvious parallel between the functions performed by CBCT's and the functions encompassed within the definition of branch contained in the McFadden Act, petitioner offers a host of narrow, technical arguments. Thus, we are told that CBCT's do not cash checks because no negotiable instrument is involved, that they do not receive deposits because a deposit does not become such until received and verified at the main bank office, and that loans are not made by CBCT's because the "loan agreement" between the bank and its customer is negotiated and signed at another time and place.

Rejecting these arguments as exalting form over substance the Court of Appeals for the District of Columbia in *IBAA* v. *Smith, supra,* carefully analyzed each of the transactions performed by CBCT's from a functional standpoint and concluded that they fell within the federal definition of branch. That analysis will not be repeated here. We respectfully refer this Court to the *IBAA* deci-

sion. When analyzed functionally, there can be no doubt that off-premises CBCT's are additional offices at which deposits are received, checks paid and money lent within the meaning of section 36(f) of the McFadden Act. Only by the most strained analysis of the functions performed by CBCT's can this conclusion be avoided. In fact, it was precisely such a form over substance argument which this court expressly rejected in *Plant City*, 396 U.S. at 137.

What the petitioner seeks here through the operation of off-premises electronic banking facilities is to obtain a competitive advantage not shared in by state-chartered banks in Illinois. Additionally, petitioner desires to implement a state-wide Electronic Funds Transfer System (EFTS) before the National Commission on Electronic Funds Transfer completes its investigation and study of this new phenomenon. Most significantly, however, petitioner's objective would tilt the delicate balance between national and state banks in our dual banking system by undermining the state's leadership role therein. No one has captured this facet of the case better than Judge Wilke in *IBAA* v. *Smith, supra,* at 936, who observed:

> "If a state has historically chosen not to allow branch banking because of a general fear of 'bigness' and large concentrations of power, there is every evidence that the Congress and the Supreme Court regard this decision as the State's prerogative. A state which generally opposes 'big banks' may foresee developments along this line: First, the larger banks will be able to afford more CBCT's than their smaller competitors. Then, the added convenience of these extra CBCT's will attract old and new customers away from the smaller banks. The end result will be fewer banks. More 'big' banks and less competition in the financial sector. Hence, a state that favors vigorous

competition by many small banks may nevertheless be forced to submit to less competition and larger banks in order to maintain a viable state banking system. This frustration of state policy was not the intent of Congress in the National Bank Act nor the intent of the Supreme Court in *Walker Bank* and *Plant City*. Properly construed, the National Bank Act and the policy of competitive equality leave to the states the question of branching and its inherent advantages and disadvantages."

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

BARRY T. MCNAMARA
PETER B. CAREY
TOM SCHEUNEMAN
*Attorneys for Amicus Curiae, Independent Community Banks in Illinois*

Of Counsel:
O'BRIEN, CAREY, MCNAMARA & SCHEUNEMAN, LTD.
39 South LaSalle Street
Chicago, Illinois 60603
(312) 372-1462

Dated: August 12, 1976